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United Mine Workers of America and Apogee Coal Company d/b/a Arch of West Virginia. Case 9-CB-10626

October 8, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The central issue in this case is whether the Respondent Union violated Section 8(b)(3) of the Act by repudiating the collective-bargaining agreement it entered into with the Charging Party on November 6, 2001. The Respondent contends, *inter alia*, that ratification was a condition precedent to an effective agreement, that the employees did not ratify the agreement, and that the agreement, therefore, is not binding. Administrative Law Judge George Carson II found that ratification was not a condition precedent to an agreement, that the agreement was binding, and that the Respondent, therefore, unlawfully repudiated the agreement.¹

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.⁴

¹ On July 23, 2002, the judge issued the attached decision. The Respondent filed exceptions. The General Counsel and the Charging Party filed answering briefs.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ The Union excepts to the judge's finding that the Company has taken no steps to open the Guyan mine because of the Union's repudiation of the agreement. We find it unnecessary to rely on the judge's finding.

The judge recommended that the Respondent Union be ordered to give full force and effect to the November 6, 2001 agreement if the Company opens the Guyan mine. In adopting the judge's recommendation, we modify the Order to reflect that, in the event the Guyan mine opens, the Respondent Union must give full force and effect to the memorandum of understanding only upon a proper demonstration of majority support among the Guyan employees. *Mine Workers (Lone Star Steel Co.)*, 231 NLRB 573, 576 (1977), *enf. denied* 639 F.2d 545 (10th Cir. 1980), *cert. denied* 450 U.S. 911 (1981), supplemental decision 262 NLRB 368 (1982).

⁴ Because there is no complaint allegation or finding that the Respondent independently violated Sec. 8(b)(1)(A) of the Act, we shall delete from the recommended Order the general injunctive "like or related" language recommended by the judge. See *Paperworkers Local 620 (International Paper Co.)*, 309 NLRB 44 fn. 3 (1992). We shall also substitute a new notice reflecting this modification and our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

Our dissenting colleague asserts that the Guyan mine agreement did not occur in the context of a lawful bargaining relationship in an existing unit, that the agreement is an illegal prehire agreement, and that to issue this Section 8(b)(3) order would be contrary to public policy. His theory has not been alleged in the complaint, raised as a defense, or litigated by the parties. Contrary to our colleague, therefore, we decline to sua sponte find that the agreement is an unlawful prehire agreement or contrary to public policy. We therefore affirm the judge and find that the Union's repudiation of the Guyan agreement violated Section 8(b)(3). Indeed, to do as our colleague suggests—to decide the case on a theory neither raised nor litigated—would deny the parties due process of law. See *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 fn. 60 (D.C. Cir. 1983) ("[E]ach party is entitled to know what is being tried, or at least to the means to find out. Notice remains a first-reader element of procedural due process, and trial by ambush is no[t] . . . favored.") (quoting *Jimenez v. Tuna Vessel "Granada,"* 652 F. 2d 415, 420 (5th Cir. 1981)); *Soule Glass & Glazing Co. v. NLRB*, 652 F. 2d 1055, 1074 (1st Cir. 1981) (administrative law judge "should [not] undertake to decide an issue which he alone has interjected into the hearing, especially where, as here, the parties were never advised to litigate the issue").

The dissent is based on the view that when the Union agreed to negotiate a new contract for a new mine, it severed its connection to the Ruffner unit and entered into negotiations as a minority union. However, the record shows that the Employer and the Respondent embarked on negotiations at least in part to preserve job opportunities for members of the Ruffner bargaining unit, once that mine was depleted. The Guyan agreement expressly refers to the Ruffner mine where reserves are being depleted and to the parties' interest in employing Ruffner employees at Guyan.⁵ It also provides a preference in employment at Guyan to employees who are represented by the Respondent and employed at the Ruffner mine. Further, the National Bituminous Coal Wage Agreement of 1998 (the National Agreement) to which the Company and Union are signatory, and which covers the Ruffner unit, contains a provision allowing the parties to apply the National Agreement to any new operations upon the Union's rec-

⁵ The Guyan agreement contains the following introductory statements of intent:

Whereas, AOWV currently operates the Ruffner mine where reserves are being depleted and AOWV hopes to commence operations in new coal reserves located in Logan County, West Virginia, which reserves will be mined by a new operation hereinafter referred to as the Guyan mine (Guyan); and Whereas AOWV wants to employ at Guyan its experienced and able work force which is now working at Ruffner and the UMW wants to secure these job opportunities at Guyan.

ognition, certification, or otherwise properly obtaining bargaining rights.⁶ Although we need not, and do not, decide the issue, all of this suggests that the Guyan negotiations took place within the context of the Ruffner bargaining relationship, and that the agreement reached vitally affects the Ruffner employees by giving them preference in employment at Guyan and protecting them from the effects of the shutdown at Ruffner.⁷ Under this view, which is at least colorable under extant law,⁸ the agreement would not contravene employees' statutory right to choose whether they wish to be represented by a labor organization or raise public policy concerns.⁹ To find otherwise, in the procedural posture of this case, would deny the parties due process of law.¹⁰

⁶ Article IA, sec. (f) of the National Agreement, entitled "Application of this Contract to Employer's Coal Lands" provides:

As part of the consideration for this Agreement, the Employers agree that this Agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. This section will immediately apply to any new operations upon the Union's recognition, certification, or otherwise properly obtaining bargaining rights. Notwithstanding the foregoing, the terms of this Agreement shall be applied without evidence of Union representation of the Employees involved to any relocation of an operation already covered by the terms of the Agreement.

The Board has approved such clauses in *Mine Workers (Lone Star Steel Co.)*, supra, 231 NLRB 573. Agreements imposed under such clauses are understood to become operative only if the union properly establishes its bargaining rights as the exclusive collective-bargaining representative of the employees to be covered by the agreement.

⁷ The Employer clearly had a duty under Sec. 8(a)(5) to bargain with the Respondent over the effects of the shutdown of the Ruffner mine. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981). That the Guyan agreement also provided concessions to the Employer from the existing Ruffner agreement's terms in no way detracts from its similarity to an effects bargaining agreement, vitally affecting the interests of the Ruffner employees.

⁸ As the issue has not been raised by the parties or litigated, Member Bartlett expresses no view in this case on the merits of Board precedent in this area.

⁹ Thus, on this record, we cannot say, as our colleague does, that the contract is clearly in conflict with public policy. To declare a contract unenforceable on public policy grounds, a tribunal must first determine that the public policy at issue is well defined and dominant. *W. R. Grace & Co. v. Rubber Workers Local Union 759*, 461 U.S. 757, 766 (1983). The policy our colleague invokes is clearly defined—protecting employee free choice—and his interpretation of the facts implicates that policy. However, it is not clear that, under the circumstances, enforcement of the agreement would be in conflict with that policy. The facts, as outlined above, allow another interpretation that does not implicate that public policy. On this record, it cannot be said that "the interest in its [the contract's] enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." *Restatement (Second) of the Law of Contracts*, Sec. 178.

¹⁰ Our colleague says that we do not have "due process concerns about reconstructing the facts and the law to find that the UMW has

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Mine Workers of America, Fairfax, Virginia, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b).

2. Substitute the following for paragraph 2(a).

"(a) Notify Apogee Coal Company d/b/a Arch of West Virginia that it will honor the collective-bargaining agreement reflected in the memorandum of understanding that it executed on November 6, 2001, and, if the Company opens the Guyan mine, give full force and effect to that agreement upon a proper demonstration of its majority support among the Guyan employees."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. October 8, 2002

Wilma B. Liebman, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, dissenting.

The Company and the Union negotiated a collective-bargaining agreement for future employees in a future bargaining unit at the Guyan mine. This agreement did not occur in the context of a lawful bargaining relationship in an existing unit. It simply stands alone as an illegal prehire agreement that preempts the future employees' statutory right to choose whether or not they desire union representation and to negotiate for their own interests. I will not sign an Order enforcing an agreement that so clearly flouts the fundamental policies of the Act.

I. THE PARTIES NEGOTIATED A NEW CONTRACT FOR A NEW MINE

The Company and the Union have a bargaining relationship at the Ruffner mine where the Union is the law-

acted unlawfully based upon a theory neither alleged, litigated nor supported by the record evidence." But we have not done so. Our basis for finding that the Respondent violated Sec. 8(b)(3) by repudiating an agreement it had entered into with the Employer is the same theory that was clearly alleged, litigated, and supported by the record. What our colleague quarrels with is an analysis that is not necessary to the disposition of the case, but rather responds to his own theory of the case, which concededly was not litigated. We have decided the case presented, and we leave open those debatable matters that were not put at issue by the parties.

ful exclusive collective-bargaining representative for the Ruffner employees. The Ruffner mine is nearing depletion and parties met to discuss the Company's plans for opening the Guyan mine. The Company representative, Lucha, said that the Company would need concessions to make the opening of the Guyan mine economically feasible. He proposed that the parties negotiate modifications to the National Bituminous Coal Wage Agreement (the National Agreement) covering the Ruffner employees and then let that agreement cover the Guyan mine when it opened.

The International Union representative, Webb, disagreed with Lucha's approach. According to Lucha's credited testimony:

Mr. Webb then objected. He told me that to modify an existing Agreement with the unit would require ratification. He told me that his experience, that he had negotiated a lot of contracts, and that his experience was that a unit seldom if ever would vote to take concessions to an existing Agreement. He suggested that we negotiate for a new mine; a new contract for Guyan and that would not require ratification. He said that is how the International would like to proceed.

Tr. 28:17-25. Lucha agreed to Webb's suggestion.

II. THE UNION NEGOTIATED OUTSIDE ITS BARGAINING RELATIONSHIP AT RUFFNER MINE

At the moment that Lucha agreed to negotiate with the Union for a new contract for a new mine at Guyan, the parties severed their connection to the employees at Ruffner mine for the purposes of negotiations concerning the Guyan mine. The Union was not acting as the representative of the Ruffner employees; indeed, it expressly refused to do so. It was, instead, acting solely as the purported representative of the future Guyan employees, employees who are not known and have not selected the Union as their bargaining agent.¹ In fact, the expressed

¹ The severance of the bargaining connection to the Ruffner employees defeats any argument that the Guyan agreement was made under the application-of-contract clause in the Ruffner National Agreement.

In *Mine Workers (Lone Star Steel Co.)*, 231 NLRB 573 (1977), enf. denied 639 F.2d 545 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981), supplemental decision 262 NLRB 368 (1982), the Board approved an "application-of-contract" clause, which permitted the parties to apply their agreement to new operations in separate and future bargaining units. The clause at issue there, however, was anchored to an existing bargaining relationship where the Union was the lawful bargaining representative for the unit employees. Indeed, the Board found the clause to be a mandatory subject of bargaining because it vitally affected the terms and conditions of employment of the bargaining unit employees by serving to protect jobs and work standards.

Here, in contrast, the Union moved outside of its role as the Ruffner employees' representative in order to avoid ratification of the Guyan agreement. The agreement it reached with the Company is not tied to its representative status with the Ruffner employees. The Union moved

theory of the complaint in this case is that employee ratification of the Guyan labor agreement was not required because there were no employees in the unit at the time the agreement was negotiated and agreed to by the Union.

Other credited testimony by Lucha also reflects that both parties recognized that their discussions occurred outside the mandatory bargaining relationship at Ruffner. Thus, Lucha testified:

We also discussed the fact that Arch of West Virginia did not want the fact that we were talking with them, trying to reach Agreement, to anyway be used to bind us, to force us into reaching an Agreement. We had other options, I explained to them, about opening this mine.

....

The fact that we were willing to sit and talk with the Union, I didn't want a claim later to come that we have been negotiating and thereby were bound to open this mine as signatory. So, we signed an Agreement that our talks wouldn't be used in that fashion.

Tr. 29:6-30:3.

Under these circumstances, it is self-evident that the Company was bargaining with a union that did not represent a majority of employees in the Guyan unit. This conduct is proscribed for both the Company and the Union under well-established precedent. *Ladies' Garment Workers (Bernhard Altman) v. NLRB*, 366 U.S. 731 (1961).²

into the status of a minority union in the Guyan negotiations and any agreement it reached while in that status is unlawful.

Although not relevant to this case, it is notable that the 10th Circuit Court of Appeals expressly rejected the Board's "vitally effects" finding in *Lone Star*, and no court of appeals has since endorsed the Board's views regarding the UMW "application-of-contract" clause. Thus, I have grave reservations regarding the lawfulness of the UMW "application-of-contract" clause in any event. Cf. *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) ("[T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry."); *Sperry Rand Corp. v. NLRB*, 492 F.2d 63, 69 (2nd Cir. 1974) ("Generally, an employer commits the unfair labor practices of interfering with employees' § 7 rights and supporting a union in violation of § 8(a)(1) and (2) when it imposes on employees of one unit the contract and bargaining agent of another unit." [citations omitted]).

² There is an exception to this precedent in the construction industry. Sec. 8(f) permits an employer engaged primarily in the construction industry to enter into a prehire agreement with a union, notwithstanding the undetermined majority status of the Union. But the parties here do not fall within this exception. They are in the coal industry and thus have entered into an illegal prehire agreement.

III. THERE IS NO SECTION 8(b)(3) VIOLATION BECAUSE THE UNION DOES NOT HAVE MAJORITY STATUS AT THE GUYAN MINE

Because the Union's conduct is proscribed, there can be no violation of Section 8(b)(3) in this case. A Union's duty to bargain arises from its majority status as bargaining representative.³ Here, the Union has no majority status with the future Guyan employees, and therefore, cannot be held to have refused to bargain collectively with the Company concerning the Guyan mine. For this reason, the Section 8(b)(3) allegation in the complaint must be dismissed.

IV. THE GUYAN AGREEMENT IS CONTRARY TO THE POLICIES OF THE ACT

I am aware that the complaint did not allege an unlawful prehire agreement. Nor was the representative status of the Union raised or litigated by the parties. I nevertheless feel the Board is compelled to confront conduct so clearly in conflict with the policies embedded in the Act that we are charged with effectuating. Underlying Section 8(a)(2) of the Act is the fundamental policy that employees "should be given an opportunity to determine for themselves which union they wish to represent them, or whether they wish to reject union representation entirely." *Judge & Dolph, Ltd.*, 333 NLRB No 19, sl. op. at 11 (2001), quoting *Sheraton-Kauai Corp. v. NLRB*, 429 F. 2d 1352, 1354 (9th Cir. 1970). The parties here have deprived the future Guyan employees of that opportunity. The Board must not let its remedial powers be used to enforce an agreement that strips employees of such fundamental statutory rights.

V. DUE PROCESS DOES NOT REQUIRE THE BOARD TO IGNORE EMPLOYEE RIGHTS

My colleagues suggest that due process considerations prevent the Board from considering whether the UMWA was the majority representative of the Guyan employees when it entered into the Guyan agreement that is the subject of this case. I do not agree. The complaint in this matter alleges a violation of Section 8(b)(3) of the Act, which provides:

It shall be an unfair labor practice for a labor organization or its agents . . . (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of [section 9(a)] of this title.

³ Sec. 8(b)(3) provides that it shall be an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)."

As noted above, one of the indispensable elements of this violation is a finding that the charged union is the majority representative of the employees for which the bargaining was conducted. I do not believe that it violates due process for the Board to consider whether the statutory requirements for finding a violation have been alleged and proved by the General Counsel. Since I see no evidence that the UMWA was the majority representative of the yet-to-be hired Guyan employees, I cannot find that the UMWA violated Section 8(b)(3) of the Act by repudiating the agreement that it negotiated for those employees.

I note, however, that my colleagues do not have the same due process concerns about reconstructing the facts and law to find that the UMWA has acted unlawfully based upon a theory neither alleged, litigated nor supported by the record evidence. Although my colleagues do not find it necessary to reach the issue, they note that the Guyan agreement could be viewed as the result of "effects" bargaining for the Ruffner employees. This is an inventive theory that has a certain superficial appeal—until one reviews the record evidence.

Although I have reservations as to whether the Guyan agreement would be lawful even if it were negotiated in the context of lawful effects bargaining, the record evidence plainly shows that the UMWA expressly rejected the Employer's suggestion that they bargain for an agreement concerning the Ruffner employees. The stated reason for this rejection was that any agreement for the Ruffner employees would require ratification, and the UMWA was adamant that the Ruffner employees would not ratify any agreement of the type proposed by the Employer. Instead, the UMWA proposed that the parties negotiate a new agreement for a new mine at Guyan because there were no employees at Guyan and therefore ratification was not required. Indeed, the absence of employees at Guyan and the lack of a ratification requirement are the cornerstones of the General Counsel's theory of this case.

Unlike my colleagues, I cannot reconcile the General Counsel's theory of this case with a finding that the parties were engaged in effects bargaining for the Ruffner employees. Simply stated, I am not willing to reconstruct the facts in such a manner as to find that the UMWA did what it expressly refused to do, and at the same time expose the UMWA to substantial additional liability for violating its duty of fair representation to the Ruffner employees. If, as my colleagues speculate, the UMWA was really negotiating for the Ruffner employees all along, but just said it was not doing so in order to defeat their ratification rights and accept an agreement that it knew they would reject, the Ruffner employees may well

have a viable claim against the UMWA. This would expose the UMWA not only to additional unfair labor practice liability, but also to potential civil liability for any losses the Ruffner employees may have suffered. In this regard, I note that the preferential hiring rights extended to the Ruffner employees in the Guyan Agreement appear to be inferior to the hiring rights that the Ruffner employees previously had under the Ruffner agreement.⁴

For all of the forgoing reasons, I would not find that the UMWA violated Section 8(b)(3) of the Act when it repudiated the Guyan agreement. However, my colleagues do not agree. Accordingly, I dissent.

Dated, Washington, D.C. October 8, 2002

William B. Cowen, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT repudiate and refuse to adhere to the collective-bargaining agreement reflected in the memorandum of understanding that we entered into with Apogee Coal Company d/b/a Arch of West Virginia on November 6, 2001.

⁴ The Guyan agreement provides a hiring preference for UMWA represented employees at Ruffner by allowing employees to place their name on a list from which the Employer may pick Guyan employees without regard to seniority. In contrast, article IIA of the Ruffner agreement provides that three out of five new jobs at new nonsignatory operations of the Employer must be filled by seniority from a list of UMWA-represented Ruffner employees who have indicated an interest in such jobs. While I have severe reservations regarding the lawfulness of either preference to the extent that they extend only to UMWA-represented employees, I note that the Guyan agreement surrenders valuable seniority rights of the Ruffner employees without their consent.

WE WILL notify Apogee Coal Company d/b/a Arch of West Virginia that we will honor the collective-bargaining agreement reflected in the memorandum of understanding that we entered into on November 6, 2001, and, if the Company opens the Guyan mine, WE WILL give full force and effect to that agreement on a proper demonstration of our majority support among the Guyan employees.

UNITED MINE WORKERS OF AMERICA

Naima R. Clarke, Esq., for the General Counsel.

Judith Rivlin, Esq., for the Respondent.

Forrest H. Roles and Denise L. Avampato, Esqs., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Charleston, West Virginia, on June 6, 2002. The charge herein was filed on February 22, 2002, and the complaint issued on April 26, 2002.¹ The complaint alleges that the Respondent Union violated Section 8(b)(3) of the National Labor Relations Act by failing and refusing to adhere to, and by repudiating, an agreement that it made with the Company on November 6. The Respondent Union's answer denies that it violated the Act and affirmatively pleads that the agreement was rejected by the affected employees. I find that the evidence does establish that the Respondent violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following.²

FINDINGS OF FACT

I. JURISDICTION

The Employer, Apogee Coal Company d/b/a Arch of West Virginia, the Company, a corporation, is engaged in the mining and sale of coal at various locations in the State of West Virginia at which it annually purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of West Virginia. The Respondent admits, and I find and conclude, that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent Union admits, and I find and conclude, that the United Mine Workers of America (UMWA) is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are in 2001 unless otherwise indicated.

² The Respondent Union's unopposed motion to correct errors in transcript is granted, and attachment 1 reflecting the corrections is received as Union Exh. 3.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Company presently, and for several years, has been mining coal at the Ruffner mine, a surface mine in Logan County, West Virginia. This mine will soon be exhausted and will close. The Company has rights to the Guyan mine, a surface mine approximately 2-1/2 miles from the Ruffner mine. The Guyan mine was worked approximately 25 years ago by other companies and a lot of the "easy" (i.e., easily accessible) coal was removed from that surface mine at that time. Engineering studies conducted by the Company established that the mine could be operated profitably if the Company were able to obtain a collective-bargaining agreement giving it some flexibility regarding such matters as scheduling and subcontracting.

Dale Lucha, currently the Company's manager of human resources and in 2001 its manager of safety and labor relations, recalls being approached in 2000 by Local Union 5958 President Ernie Woods and Chairman of the Ruffner Mining Committee Roger Horton regarding the possibility of mining Guyan. Woods recalls that Lucha approached him in 2001. Regardless of who approached whom, all parties agree that on September 12 there were formal discussions between the parties regarding the possibility of mining at the Guyan mine. Lucha specifically requested that representatives of the District and International be present because he knew that the International was the bargaining agent for the Union.

Prior to the September 12 meeting, Woods requested UMW President Cecil Roberts to "assign someone to help" in negotiating to secure the Guyan properties. Roberts said to "wait." The date for the September 12 meeting was approaching, so Woods called International Teller Bobby Webb, whom he knew from prior organizing campaigns, and requested that he attend the meeting. Webb is both an International teller and director of the Southern West Virginia Career Center. As an International teller he has responsibility for conducting International elections and ratification votes regarding National Agreements. He also performs duties as assigned by the International including organizing and negotiating. Typically, Webb receives a letter signed by President Roberts authorizing him to enter into negotiations and requesting that he report on the progress of the negotiations to the collective-bargaining office of the Union. Upon being asked by Woods to come to the September 12 meeting, Webb contacted Dan Barnett, executive assistant to President Roberts. Barnett directed Webb to contact District 17 President Joe Carter, stating that if Carter did not have a problem Webb should go to the meeting and then report on what occurred.

The September 12 meeting, held in a conference room at a Charleston, West Virginia motel, included Lucha, General Manager Ken Hodack, and Brent Couch, manager of the Ruffner mine, for the Company and Local 5958 President Woods, Chairman Horton, District 17 President Carter, and Webb for the Union. The Company, at the outset, explained that if it were to mine the Guyan property it would need a contract that would make it economically "a good project" for the Company. Lucha proposed that the parties negotiate changes to the National Bituminous Coal Wage Agreement so that their agree-

ment would apply to the Ruffner mine and "we would then allow the Ruffner mine to just absorb this Guyan property." Webb disagreed. Lucha testified that Webb explained that any modification of an existing agreement required ratification and that in his experience "a unit seldom if ever would vote to take concessions to an existing Agreement." He proposed that the parties proceed by negotiating a new contract for a new mine, noting that such a contract would not require ratification. Couch recalls that Webb explained that there would be no ratification vote "because it is a new mine and you don't have anybody working there." Webb and Woods do not dispute that Webb objected to any modification of the National Agreement with respect to the Ruffner employees stating that Ruffner was under the National Agreement and was "not part of these talks . . . [w]e will talk about the new properties and an Agreement at those new properties." Although denying that ratification was mentioned in the meeting, Webb, in testimony, confirmed that there is "no ratification process" regarding an agreement for a new mine because "you can't identify who is going to go."

Lucha agreed to negotiate for an agreement for a new mine, but noted that the Company had other options including contracting out the operation or selling the property. He stated that he did not want the fact that the Company was "willing to sit and talk with the Union" to result in a claim that it was "bound to open this mine as signatory." Lucha, Woods, Horton, Carter, and Webb signed a document stating that the parties desired to enter "confidential discussions" and that "neither party shall utilize . . . such discussions. . . in furtherance of any claim . . . pursuant to the [National] Agreement."

On September 26, the parties met again. Lucha and Couch were present for the Company. Woods, Horton, Carter, Webb and Dave Evans, a District 17 executive board member, were present for the Union. Lucha noted various deviations from the National Agreement that the Company needed in order to operate the Guyan mine profitably. The deviations included more flexibility in scheduling employees for work than was permitted under the National Agreement and the right to contract out the transportation of coal from the mine. The parties reached an agreement in principle and, at the conclusion of the meeting, representatives of the parties, including Lucha, Webb, Carter, Evans, and Woods, signed a Memorandum of Understanding subject to review by the Company's corporate legal office in St. Louis and the Union's contract office in Washington, D.C. Paragraph 1 of the Memorandum of Understanding provides that the Guyan mine "will be opened as a new mine." Appendix A sets out the staffing priority of the Guyan mine, the first three priorities being active employees at the Ruffner mine, laid-off employees of the Ruffner mine who have been paneled to the Ruffner or Guyan mines, and laid-off employees of Apogee/Hobert District 17 Panel who have been paneled to the Ruffner or Guyan mines.

Lucha, corroborated by Couch, testified that, on September 26, when Lucha was proposing certain deviations from the National Agreement, Local Union President Woods stated that "the Ruffner guys will never go for that; they won't vote for that." Lucha responded that he understood that he was negotiating with the International and asked what did the Ruffner employees "have to do with it." Webb asked for a caucus and

returned. He stated to Lucha that the Company was negotiating with the International, and the discussion continued.

Woods admitted that on several occasions he would "lose it" and "they," referring to the other representatives of the Union, "would take me outside and talk to me." He testified that District 17 Representative Dave Evans assured him that the Memorandum of Understanding was just a "wish list." The Memorandum of Understanding (MOU) speaks for itself and clearly states that the Company and the UMWA "agree to the following."

Webb denied that ratification was ever mentioned in negotiations but that it was discussed "internally with the Union." I do not credit that testimony. Webb confirmed that, when negotiating a contract for a new mine there "is no ratification process because there [are] no people to vote on it." The specific designation of the Guyan mine as a "new mine" in the MOU confirms that Webb, from the outset of negotiations, was aware that employees would not "take concessions to an existing Agreement." I credit Lucha and Couch's testimony that Webb explained to them that in order to avoid a ratification vote the parties needed to negotiate a new contract for a new mine. Webb acknowledged that he was concerned that, if the Ruffner employees did not get those jobs, "the Employer would contract it [the Guyan mine] out and operate it non-Union." Woods' admission that he "lost it" on several occasions corroborates the observations of Lucha and Couch that Woods disagreed with the terms of the agreement that Webb was negotiating. The fact that the parties continued to negotiate confirms that Webb assured Lucha that he was negotiating with the International. I credit Lucha and Couch and find that when Woods raised objections to the terms being negotiated Lucha sought assurance that he was negotiating with the International and that Webb gave him that assurance.

On November 6, the parties again met in Charleston. Present for the Company were Lucha and Couch. Present for the Union were three International Union Representatives Webb, James F. "Freddie" Wright, Regional Director of Region 2 of the UMWA, and International Representative Bernard Evans, as well as Carter, Dave Evans, Woods, and Horton.

Prior to this meeting, the members of Local 5958 had been advised by Woods of the terms of the MOU and, as Woods had anticipated at the bargaining table, they objected to them. Woods testified that the members asked him not to sign anything that they did not ratify. Prior to the November 5 meeting, Woods informed Webb and Wright that the members of the Local would not accept the agreement and he would not sign it. Neither Webb nor Wright mentioned this to the Company.

At the meeting, Carter requested that Lucha, who had prepared the final agreement, read it in its entirety. Lucha did so. Carter requested one change and then requested that Lucha alter the signature page, which had been prepared for signatures by representatives of the International, District 17, and Local 5958. Lucha recalled that "Carter pointed out that, as I knew, only the International can bind itself to an Agreement and that I should take off the signatures for the District and the Local. So, I went back and made that change." There was no discussion regarding ratification. Lucha, Webb, and Wright signed the agreement

and all parties congratulated themselves upon coming to an agreement.

On November 6, ratification was not mentioned. According to Webb, he had anticipated that the MOU would be submitted for ratification, but this anticipation on his part was never communicated to the Company. He testified that Wright came "to try to see if he could get Ernie and Roger [Woods and Horton] to support the MOU" and that, when Wright failed to obtain the support of Woods and Horton, he and Wright decided that the MOU would not be subject to ratification. In view of Woods' unwavering opposition to the terms of the agreement, I am disinclined to credit this testimony. Woods acknowledged that he became concerned that the agreement would not be subject to ratification when he saw that Freddie Wright was present for the meeting of November 5. He feared that the International "would just hammer one down and say that this is it." Woods was asked, "When you saw Mr. Wright, you knew that it was going to be a final Agreement, correct?" Woods answered, "I was afraid that Mr. Wright would sign the Agreement, yes." The foregoing testimony establishes that Wright's presence was to assure that there was no question but that a binding agreement had been made. Wright's participation confirmed Woods' suspicion that the International "would just hammer one down and say that this is it."

Regardless of the reason for Wright's presence, it is undisputed that ratification was never stated as a condition of the agreement entered into between the Company and the Union on November 6. After the agreement was signed, the representatives of the parties "stood up and shook hands and patted each other on the back and congratulated each other for reaching an agreement." Woods later told the members of the Local, it was a "signed deal."

The Union stated that it intended to have a meeting with the Ruffner employees to explain the agreement. The agreement was not presented to the employees for ratification. Employee Ervin Hensley was present at that meeting. He testified that Woods informed the employee that this is "a signed deal. There is nothing that we can do about it." The union officials were questioned about the terms of the agreement. In responding to a question from Hensley regarding why they had negotiated the agreement, District 17 Representative Dave Evans replied, "We are trying to keep you all a job." The members directed Woods to contact President Roberts "to see if we were actually going to get a vote . . . or rescind the MOU." At some point, the record does not disclose when Woods did so. In early December, Roberts directed that the Union have a ratification vote. Only active employees at Ruffner voted. No laid-off employees or employees on the Apogee/Hobert panel were notified of the vote. The employees voted against the agreement 175 to 15.

In early December, Lucha received a telephone call at his home from Mine Chairman Roger Horton. Horton informed Lucha that the Ruffner employees were dissatisfied with the Guyan agreement, that they had contacted UMWA President Cecil Roberts informing him that they felt the Union had "sold them out," and that Roberts had instructed them to have a vote. Lucha informed Horton that he did not understand why the employees were voting since, as far as the Company was concerned, they had as "signed binding agreement."

The following morning, Lucha called Webb who confirmed what Carter had said. Webb went on to explain that his meeting with the Ruffner employees, at which he had tried to explain the agreement, had gone “very badly,” the employees were upset and he did not have the opportunity to explain the agreement very well.

Lucha, after speaking several more times with Webb, met with UMWA President Roberts. Lucha, General Manager Hodack, Roberts, and Webb were present. Roberts noted that the Ruffner employees were unhappy with the agreement and questioned whether it could be changed. Lucha responded that the Company was willing to discuss making changes so long as it was moving “a dollar from one pocket to another” within the agreement. Roberts asked for some time to see if he could make any suggestions and Lucha agreed. The parties met a second time. Roberts, noting that employees were specifically upset with the work schedule provisions, suggested some other schedules. Lucha noted that the revised schedules were too expensive. Roberts then advised that it was the Union’s position that the agreement needed to be ratified. Lucha pointed out that the parties had negotiated for a new mine and that did not require ratification.

Lucha and Roberts had several telephone conversations and finally on or about February 8, 2002, Robert directly stated to Lucha that it was the position of the International that the agreement was not binding because it was not ratified. Because of the Union’s action, the Company has taken no steps to open the Guyan mine.

President Roberts was advised by local union officials that they did not like the agreement. Roberts then “asked a number of questions” and, in early December, directed a ratification vote. Roberts did not identify whom he questioned or what he asked. Roberts testified that it was his opinion that Guyan was not a new mine, that it was a “relocation of an existing bargaining unit,” but neither Roberts nor Lucha assert the Roberts made any demand to alter the language of the MOU which specifically provides that “Guyan will be opened as a new mine.” The National Agreement does not define what constitutes a relocation; it is not “spelled out specifically.”

Although Roberts testified, and the UMWA constitution specifically provides, that agreements under which unit employees work must be ratified by those employees (see art. 19), Roberts acknowledged that when the Union is bargaining regarding a new mine “we don’t put that to a ratification vote because there isn’t anyone in the bargaining unit.” Appendix A of the MOU and Webb’s testimony confirm that no employee from the Ruffner mine can be involuntarily transferred. Employees bid on positions at the new Guyan mine in accord with the priorities set out in appendix A.

Webb acknowledged that when he signed the agreement “there was going to be no ratification.” He then testified that he “overstepped” his authority by signing the agreement without making it subject to ratification. I do not credit that testimony. Webb acknowledged that he had reported on the progress of negotiations to Barnett and, prior to November 6, advised both Barnett and Roberts that the parties were preparing to sign an agreement. On November 6, there were three representatives of the International Union present, Webb, Wright, and Interna-

tional Representative Bernard Evans. Both Webb and Wright, who did not testify, signed the MOU.

B. Contentions of the Parties

The Union, in its brief, cites its constitution and article XXIX or the National Agreement. The constitution, in article 19, provides that proposed contracts shall be submitted to “a ratification vote by all members covered by the proposed agreement.” Article XXIX of the National Agreement provides that it is subject to ratification by “the membership covered hereby.” Counsel argues that, because no provision of the MOU modified this language, article XXIX was effectively included in the agreement, that its negotiator had no authority to waive ratification, and that the Company “had no reasonable basis for believing Webb could waive ratification.”

The foregoing argument ignores the specific language in paragraph 1 of the MOU that “Guyan will be opened as a new mine.” Although Roberts testified that he considered Guyan to be a “relocation,” he acknowledged that when negotiating for a new mine, “we don’t put that to a ratification vote because there isn’t anyone in the bargaining unit.” Thus, consistent with testimony of both Roberts and Webb, article XXIX would not be applicable to a new mine because, until employees are hired, there are no “members covered by the proposed agreement.”

The Union, notwithstanding the “new mine” provision in the MOU, argues that a ratification vote was required because Guyan was “dedicated to the Ruffner bargaining unit.” The MOU, in appendix A, does give the first preference for employment at the Guyan mine to current employees at the Ruffner mine; however, to quote Webb, until the mine is opened “you can’t identify who is going to go.” Insofar as an insufficient number of Ruffner employees were to apply to work at Guyan, employees from the various panels identified in appendix A would be offered positions in the priority established by the appendix. Whether those employees are willing to work under the UMWA contract to which the parties agreed on November 6 is not known because they were not notified of the ratification vote. The foregoing scenario confirms the rationale behind the absence of ratification of an agreement covering a new mine. Until employees are hired, there are no “members covered by the proposed agreement.”

The Union also argues that upon principles of equity the MOU should not be imposed “over the affected workers’ objections.” Citing *Teamsters Local 287 (Reed & Graham)*, 272 NLRB 348 (1984), the Union argues that rescission may be ordered due to mutual mistake. The problem with this argument is that there was no mistake. The parties negotiated an agreement for a new mine.

The General Counsel and the Charging Party argue that Webb had both actual and apparent authority. The General Counsel notes that Webb informed Roberts that the parties were preparing to sign an agreement and that, on November 6, not one but three International representatives were present.

The Charging Party, noting that Don Barnett was aware that Webb was going to attend the negotiations and that Webb reported upon the progress of the negotiations to Barnett and Roberts, argues that the Union’s assertion that Webb and

Wright lacked authority to bind the Union is without legal merit. In support of this argument, the Charging Party cites *Carpenters Local 405*, 328 NLRB 788 (1999), in which the administrative law judge cited longstanding Board precedent as follows:

To borrow from *Sunset Line and Twine Co.*, 79 NLRB 1487, 1509 (1948), it is of no consequence that Respondent had “not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.” [Id. at 792, citations omitted.]

C. Analysis and Concluding Findings

Board precedent makes clear that ratification is an internal union procedure and that, unless made an express condition precedent to an agreement, it is unnecessary. *Beatrice/Hunt-Wesson*, 302 NLRB 224 fn. 1 (1991); *Williamhouse-Regency of Delaware*, 297 NLRB 199 fn. 5 (1989), enfd. 915 F.2d 631 (11th Cir. 1990).

Notwithstanding the minor discrepancies regarding exactly what was said at the bargaining table, it is undisputed that the Company was seeking various deviations from the National Agreement since it could not operate the Guyan mine profitably without those deviations and that Webb, an experienced negotiator with the UMWA, was concerned that, if the deviations were not given so that the Ruffner employees got those jobs, “the Employer would contract it [the Guyan Mine] out and operate it non-Union.” Thus, on behalf of the UMWA, he and Regional Director Wright agreed to the deviations.

The Union’s negotiator established the parameters for the negotiations. Whether the parties could have achieved their objectives by bargaining for a “relocation” or, as Lucha initially suggested, bargaining changes that would apply to Ruffner and then “absorb[ing] this Guyan property” is academic. Webb rejected that suggestion. Webb, by his own admission, advised Lucha that the parties would be bargaining regarding “new properties and an agreement for those new properties.” The MOU that they negotiated, pursuant to Webb’s proposal, affects only those “new properties.” It provides that “Guyan will be opened as a new mine.”

The Union now contends that neither Wright nor Webb had the authority to enter into the agreement without ratification. Although Webb testified that Wright was present to try to convince Woods and Horton to support the agreement, there would have been no reason for him to sign the document if that had been the reason for his presence. Woods’ testimony establishes that Wright was present to make “a signed deal.” Regional Director Wright did not testify. The Union proposed, and the Company agreed, that the parties bargain an agreement covering a “new mine.” They did so, and that is what the MOU states. Webb and Woods, although denying that an absence of ratification was mentioned, agree that Webb was negotiating regarding “new properties.” Both Roberts and Webb confirmed that agreements for new mines do not require ratification.

Kasser Distiller Products, 307 NLRB 899, 905 (1992), citing *University of Bridgeport*, 229 NLRB 1074 (1977):

[T]he Board has long held that an agent appointed to negotiate a collective-bargaining agreement . . . is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary.

There is not a scintilla of evidence that the Company received any notice whatsoever that Webb did not have full authority to conclude the agreement that he negotiated. Unlike *State County Employees AFSCME Council 71 (Golden Crest)*, 275 NLRB 49 (1985), there is no evidence that the Company “was aware or reasonably should have been aware that the authority of the union negotiators was limited to negotiations and could not, in the absence of ratification, bind the Union to a contract.” Id. at 50. Even if there had been some question regarding Webb’s authority, the presence of and participation by Wright in the meeting, at which Lucha read the MOU and altered the signature because “only the International can bind itself to an Agreement,” would foreclose any inquiry regarding Webb’s authority. Both Webb and Wright signed the agreement that, by its terms, established working conditions at a new mine. Ratification was not a condition of the agreement. Ratification is not required for new mines.

The Respondent Union, by prospectively refusing to adhere to the terms of the Memorandum of Understanding and by repudiating it, violated Section 8(b)(3) of the Act.

Contrary to the argument of the Respondent Union regarding “equity,” in making the foregoing finding, I am not imposing upon employees at the Ruffner mine any terms or conditions of employment which they rejected when refusing to ratify the agreement. The agreement applied to a new mine and was not subject to ratification. Employees from the Ruffner mine who are willing to work under the terms embodied in the MOU may transfer and work at the new Guyan mine. Those who object to working under the terms that the parties negotiated may elect not to work there.

CONCLUSION OF LAW

By refusing to adhere to and by repudiating the Memorandum of Understanding that it executed on November 6, 2001, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Because of the Respondent’s unlawful actions, the Company has taken no steps to open the Guyan mine.

The Respondent, having repudiated the Memorandum of Understanding that it executed on November 6, 2001, and having refused to adhere to that agreement, it must advise the Company that it will honor the agreement and, if the Company opens the Guyan mine, the Respondent Union must give full force and effect to the Memorandum of Understanding.

The Respondent will also be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, United Mine Workers of America, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating and refusing to adhere to the collective-bargaining agreement reflected in the Memorandum of Understanding that it entered into with Apogee Coal Company d/b/a Arch of West Virginia on November 6, 2001.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify Apogee Coal Company d/b/a Arch of West Virginia that it will honor the collective-bargaining agreement reflected in the Memorandum of Understanding that it executed on November 6, 2001, and, if the Company opens the Guyan mine, give full force and effect to that agreement

(b) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places at the offices and meeting halls of Local 5958 and at all places at the Ruffner mine where notices to members and em-

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

Dated, Washington, D.C. July 23, 2002

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT repudiate the collective-bargaining agreement reflected in the Memorandum of Understanding that we entered into with Apogee Coal Company d/b/a Arch of West Virginia on November 6, 2001.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify the Company that we will honor the agreement and, if the Company opens the Guyan mine, give full force and effect to that agreement.

UNITED MINE WORKERS OF AMERICA